No. 84-1513

IN THE SUPREME COURT OF THE

UNITED STATES

OCTOBER TERM, 1985

THE PEOPLE OF THE STATE OF CALIFORNIA,
Petitioner,

v.

DANTE CARLO CIRAOLO,
Respondent.

On Writ of Certiorari to the
California Court of Appeals
for the First District

BRIEF OF THE CIVIL LIBERTIES MONITORING PROJECT AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

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QUESTIONS PRESENTED

1. Whether the state's intentional visual surveillance into an American's curtilage is a search intruding upon a reasonable expectation of privacy in violation of the Fourth Amendment.

2. If the state's intentional aerial surveillance into the curtilage is not a full-fledged search, whether the brief aerial surveillance of a curtilage is a Fourth Amendment intrusion as significant as a stop of the person, requiring particularized suspicion.

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INTERESTS OF AMICUS CURIAE

The Civil Liberties Monitoring Project ("Project") is a nonprofit California corporation. The principal focus of the Project is on the continued preservation and enhancement of individual rights and liberties. The Project engages in discussions and other forms of education concerning civil liberties and civil rights. General aerial surveillance threatens the privacy and welfare of the organization's members, particularly because many of its members live in isolated areas in rural counties subject to this new law enforcement technique. Amicus is presently engaged in litigation with the Federal Government and the State of California in a case challenging governmental aerial surveillance. The National Organization for the Reform of

Marijuana Laws v. Mullen, 608 F.Supp. 945 (D.C.Cal. 1985).

SUMMARY OF ARGUMENT

The state, and amici in support of the state, write as if this case concerns only a marijuana garden.[1] In fact, at stake in this case is the privacy of Americans in their own homes and curtilages.

The state's argument--that the aerial search conducted in this case is not really a search and in any event not unreasonable--logically would permit searches by other technological means,

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1. For the sake of simplicity, amicus will refer to the arguments of the state as including those arguments advanced by the amici curiae in support of the state.

at best degrading an expectation of privacy as we know it, and permitting substantial, difficult to control, abuses.

The state's argument is at war with Fourth Amendment law and any reasonable policy attempting to accommodate both the state's interests and the important policies underlying the Fourth Amendment. For this Court to establish a narrow principle of law upholding only this type of plane search would further complicate Fourth Amendment jurisprudence; but to establish one of the broad principles of law advocated by the state and amici would inadvertently lay the groundwork for an Orwellian-type government able to keep its subjects under 24-hour surveillance.

Amicus asks this Court to declare that Americans' subjective

expectation of privacy from unfettered governmental spying into their homes and curtilages is an expectation this Court, and society in general, is prepared to recognize as reasonable, and thus constitutionally protected. At a minimum, this Court should hold that a brief aerial search of a curtilage is a privacy intrusion as serious as a stop of the person, and thus requires founded suspicion.

ARGUMENT

I

THE STATE'S INTENTIONAL VISUAL SURVEILLANCE INTO A HOME OR CURTILAGE IS A SEARCH INTRUDING UPON A REASONABLE EXPECTATION OF PRIVACY IN VIOLATION OF THE FOURTH AMENDMENT

The state's primary argument is the Fourth Amendment prohibits only physical intrusions into the privacy of one's home and curtilage; visual searches into one's home and curtilage are not really searches. (Brief for Petitioner at 16-17, 32-34). Amicus agrees with the state there is no meaningful distinction between the constitutional protection Americans enjoy in their homes, as opposed to their curtilages (Brief for Petitioner

at 34 & n.10). The curtilage of a home is the area to which extends "the intimate activity associated with the sanctity of a man's home and the privacies of life." Oliver v. United States 466 U.S.___,___, 80 L.Ed.2d 214,225; 104 S.Ct. 1735,1742 (1984). Because the principle of law is the same, Amicus will often refer to the house and the curtilage simply as the home.

The problem with the state's distinction between a visual and physical search is that from the viewpoint of most Americans a visual search is just as intrusive as a physical search. In George Orwell's Nineteen Eighty-Four (1949), Big Brother did not physically intrude upon the subjugated populace's homes and curtilages. Instead, the omnipresent video screens and helicopters adequately

kept people under constant surveillance.

The state's theory is inconsistent with the law. Whether the police are physically in a place where they have a legal right to be is not determinative of the legality of a search that is conducted from that place. For example, the telephone wiretap the police placed in the public telephone booth in Katz was also in a place it had a legal right to be. Katz v. United States, 389 U.S. 347 (1967). Thus, because the right of privacy focuses on a person's reasonable expectation of privacy, the issue in this case is whether Americans reasonably expect some protection from general systematic aerial surveillance of the curtilage. Whether the state has physically intruded onto property is simply not a determining factor in

assessing a Fourth Amendment privacy violation. Oliver v. United States, supra, 466 U.S.___, 80 L.Ed.2d 214,227.

A critical factor is whether the state's visual intrusion was intentional or accidental. Certainly, Americans do not object to the casual, inadvertent view of a neighbor or police officer into their homes or backyards. Moreover, such an inadvertent plain view is legally permissible. Coolidge v. New Hampshire, 403 U.S. 443, 469-470 (1971). But virtually all Americans object to Peeping Toms peering into their windows late at night or spying upon them in their backyard to catch a glimpse of some private matter. Americans engage in private matters in the privacy of their backyards and homes without feeling the need to build opaque domes and to shutter

windows because the risk of Peeping Toms is so minimal that Americans generally do not live in paranoid fear of such intrusions. There is a big difference, however, between Peeping Toms and the government. See e.g. United States v. Kim, 415 F.Supp. 1252,1256-1257 (D.Haw. 1976).

Recently, the government has launched a war called the Campaign Against Marijuana Planting (CAMP) against thousands of innocent Americans in an effort to curtail marijuana cultivation. In National Organization for Reform of Marijuana Laws v. Mullen, 608 F.Supp. 945 (D.C.Cal. 1985), the court recounted numerous incidents where federal and state personnel used helicopters to look into persons' homes and curtilages, and to chase innocent people into the woods or

frighten them. Id. at 950-951,955-56. Marilyn Beckworth, for example, was "continually buzzed" by a helicopter while taking her outdoor shower. Id. at 955. Allison Osborne testified that occupants of a law enforcement helicopter flew about fifty feet above the ground right outside her home and made obscene gestures at her seven year old daughter. Id. She said it felt like Vietnam as the "leaves from the trees are blowing down on your head and the children are kind of hanging on to you because it feels like you'll be gusted away." Id. at 956. A CAMP helicopter blew the toilet paper from Charles Keyes reach as he was using his outhouse. Mr. Keyes and his five year old son Arthur left their property in fear of their safety. Id. at 955.

The court summarized the

unbelievable conduct of the government as follows:

> "Rather, the uncontradicted evidence shows regular intrusions into the areas immediately surrounding the home. These helicopters are no longer just surveying open fields, but are deliberately looking into and invading peoples' homes and curtilage. Moreover, this prying is not limited to an occasional, casual peek during an overflight to a raid site, but is accomplished through sustained and repeated buzzings, hoverings, and dive bombings that at best disturb, and at worst terrorize, the hapless residents below.
>
> It is not just the highly disruptive character of low helicopter flights that distinguishes them from the common airplane overflights that we are all accustomed to, but also the degree of their intrusiveness into "the privacies" of life; an airplane can see far less than a helicopter that is hovering outside a bedroom window or over an open outhouse or shower. This case demonstrates how the unique versatility of helicopters renders them at once an effective law enforcement tool and an unprecedented threat to civil liberties."

Id. at 957.

Under the state's theory, however, an aerial search is a "non-search"; it is only a search if the police land the helicopter on one's home or in one's backyard. This doublespeak harkens back to Orwell. When a search is no longer really a search; when a helicopter hovering at one's bedroom window is not a violation of one's privacy; when intentional aerial surveillance of one's home and curtilage is no longer an intrusion, then words become meaningless and Americans' lack of respect for law and justice sinks deeper.

If Americans' subjective expectation of privacy in their homes and

curtilages is unreasonable as applied to visual spying, Americans will not be able to engage in any private, intimate matter in any place in the world except behind closed doors and shuttered windows. Americans do not reasonably expect privacy in their backyards because they are all growing marijuana. There are hundreds of activities people enjoy doing in their backyard, in part because they believe they have privacy. Such activities include playing with one's children, having a talk with one's son, showing affection to one's spouse, or having friends over for a barbeque.

Simply imagine a police agent's head hanging over a backyard fence, or perched in a tree in an open field, or sticking out of a hovering helicopter or a circling plane watching a teenage

daughter's birthday pool party. Would it be reasonable if her father believed the police officer was invading his family's privacy even though the agent had not physically entered his backyard and began swimming and dancing with his daughter and her friends? Would it be reasonable for her mother to tell the police officer to leave them alone--that her daughter and her friends felt inhibited so long as the police officer watched. Yet, the officer would have as much reason to watch this birthday party for possible crime as to survey every American's backyard garden for marijuana. Young people have been known unlawfully to drink alcohol, use drugs or engage in sex at parties at least as frequently as the average American grows marijuana in his backyard.

The state, however, does not

discuss teenage birthday parties. Instead, the state argues the crime of growing marijuana in one's backyard is so terrible that all Americans ought to be willing to give up their right to privacy anywhere the sun can shine. The real issue is whether it is reasonable for Americans to expect privacy at their childrens' backyard birthday parties or weddings, or in their bedrooms. In short, a visual invasion into the privacy of one's home or curtilage is not different enough from a physical intrusion to justify less than full Fourth Amendment protection: probable cause and a search warrant.

The state's concern the police will have difficulty not looking into Americans' curtilages or homes, while freely looking into open fields, is misdirected. This Court recognized the

courts and the police are capable of distinguishing between open fields and curtilages. Oliver v. United States, supra, 466 U.S. at___, 80 L.Ed.2d at 226 n.12. There is no showing--nor could there be--that police patrols in planes have a difficult time distinguishing between a home and its curtilage and an open field. Any person with eyesight good enough to qualify to fly a plane, can distinguish between a home and an open field. In California, the CAMP operation is presently under court order to keep helicopters and planes at least 500 feet away from all homes. National Organization for the Reform of Marijuana Laws v. Mullen, 608 F.Supp. 945,965-66 (D.C.Cal. 1985). Only intentional intrusions are enjoined. Id. at 965 n.17.

It is imperative to distinguish

between an intentional visual intrusion into a home, and an inadvertent view. The state's intentional invasion into Americans' last bastion of privacy is necessarily different from a casual glance of a passerby or the casual sightings of plane passengers. Intentional police surveillance has the potential of cowering the populace and suppressing the vitality and joy of life of a nation.

II

IF THE STATE'S INTENTIONAL AERIAL SURVEILLANCE, FOR A BRIEF TIME, INTO THE CURTILAGE IS NOT A FULL-FLEDGED SEARCH, IT IS AT LEAST AS SIGNIFICANT AN INTRUSION AS A BRIEF STOP, THUS REQUIRING PARTICULARIZED SUSPICION

Amicus agrees with the state that it is significant the police took to

the air in this case "following a report of suspicious activity." (Brief of Petitioner at 19). Random, general aerial searches of everyone's home without a warrant are far more objectionable than the aerial surveillance of a particular person's home for which the police have founded suspicion of a crime. If this Court does not believe this particular plane search to be a full-fledged search requiring probable cause, it is at least as intrusive as a brief stop on the street--requiring particularized suspicion. See, e.g., United States v. Cortez, 449 U.S. 411, 417-418 (1981); Terry v. Ohio, 392 U.S. 1,16 (1968). Many of the aerial searches upheld by lower courts involve some amount of particularized suspicion rather than general, systematic surveillance of

everyone. See, e.g., United States v. Marbury, 732 F.2d 390,398-399 (5th Cir., 1984); United States v. Allen, 675 F.2d 1373,1381 (9th Cir. 1980), cert. denied 454 U.S. 833 (1981); United States v. DeBacker, 493 F.Supp. 1078,1081 (W.D. Mich. 1980); State v. Rogers, 673 P.2d 142,144 (N.M.App. 1983).

A generalized suspicion that some persons in a certain county are growing marijuana, however, does not justify the wholesale invasion of everyone's privacy who lives within the county. See Brown v. Texas, 443 U.S. 47 (1979) (being present in a high crime area with a great deal of drug traffic is not a sufficiently suspicious circumstance to justify the momentary stop of a particular individual and to request identification from him.) Moreover, unless this Court

requires at least a standard of founded suspicion, "by only modest logical extension, legitimacy [will be] conferred on 'random' enhanced viewing of a whole neighborhood of unfenced yards from a government satellite in geosynchronous orbit." (Brief of Petitioner at 43 n.16).

A minimal standard of founded suspicion is essential to prevent the state from enjoying an unfettered right to spy upon Americans twenty-four hours a day for weeks at a time so long as the police hide in the open fields or woods, or use high-flying planes, rather than openly enter backyards where they would be visible. See United States v. Lace, 669 F.2d 46,57 (2d Cir. 1982). (Court upheld three weeks of warrantless 24-hour surveillance by camouflaged police officers peering through telescopes from

the wooded fields).

If Americans have no reasonable expectation of privacy from aerial surveillance into their homes and curtilages, then it would be lawful for the state to photograph bedrooms through skylight windows in the roof, or use X-rays to penetrate a curtained window or a solid roof. It would simply be unreasonable, however, to force law-abiding Americans interested in preserving their privacy to line the walls, windows and roofs of their homes with a substance impenetrable to X-rays or to build an opaque dome over their curtilages.

In establishing a clear, bright-line rule in this difficult Fourth Amendment area, see New York v. Belton, 453 U.S. 454, 458-459 (1981), the

well-understood standard of founded suspicion is preferable to many of the standards proposed by the state.

For instance, this Court should not give constitutional significance to the type of visual surveillance the state used in conducting the search. (See Brief of Petitioner at 13, 20-21). It would only add further confusion to Fourth Amendment jurisprudence to give lower courts the Herculian task of distinguishing among the myriad kinds of ground searches, helicopter searches, the plane search in this case, plane searches at 2000 feet with binoculars; U-2 spy plane searches at 10,000 feet with sophisticated photographic equipment, cf. Dow Chemical Company v. United States, 749 F.2d 307 (6th Cir. 1984), cert. granted, ___U.S.___, L.Ed.2d___, 105 S.Ct.2700; and

spy satellites using computers to keep Americans under 24-hour surveillance. The impact on Americans' right to privacy is similar, no matter where the vantage point of the state agent, or what the technological equipment.

This Court should also not burden lower courts with the need to decide whether a particular technological device allowed the state to view an object that otherwise could only have been seen by physically intruding into the curtilage. One can imagine the absurd lengths the defense and prosecution could go in trying to prove that an object seen by the police could not have been seen from a legal vantage point without the use of the technological device. (See e.g. People v. Arno, 90 Cal.App.3d 505,509-512 (1979).

The result in this case should not depend on the location of Ciraolo's home. The fact Ciraolo's home happened to be located in a suburban area in close proximity to a major airport should be deemed irrelevant. It would make a mess of Fourth Amendment jurisprudence to force lower courts to hold hearings about the proximity of airports to an American's home, the absence or presence of air traffic over a person's land, or whether the visual search of a home occurred in an urban in contrast to a remote rural area of the country. It would also be unfair to distinguish among Americans in this arbitrary fashion with respect to the highly-valued blessings of freedom and privacy.

It should also be immaterial that Ciraolo's home and backyard had a

fence, but nevertheless, might have been in view of neighbors, utility workers, roofers, or children climbing trees. Many Americans live in homes and spend private moments in backyards which are more or less protected from view than was Ciraolo's home. This Court should avoid establishing a rule of law which would encourage Americans to build high walls, moats, opaque domes, or castles. To distinguish among Ciraolo's suburban home and a suburban home without a fence; or one with a high wall and many trees around it and one without trees; or a rural home in a remote location protected by dogs and fences and a rural home hidden in the woods would only deepen the quagmire of Fourth Amendment jurisprudence. The issue is not whether private citizens can spy upon neighbors, or whether the police can

accidentally look into a home; the issue is the propriety of intentional visual searches into a curtilage by the state's police.

It would be unprincipled to allow the legality of visual searches to depend upon the type of object seen. Under this theory, the legality of an aerial search would depend upon whether an American used his backyard for sunbathing as well as for marijuana cultivation. Fourth Amendment protection has never depended upon whether the police were looking only for marijuana and saw only marijuana. Just as there is no murder scene exception to the Fourth Amendment, Mincey v. Arizona 437 U.S. 385, 393-395 (1978), there is no marijuana scene exception to the Fourth Amendment. Thus, Ciraolo's fenced suburban backyard should

not lose its status as a curtilage because alot of marijuana was grown in it. It would cause unimaginable confusion to have courts define a curtilage on the basis of the size or number of marijuana plants grown within it.

Amicus feels compelled to add a final word in response to the state's arguments about the probable impact of this Court's decision on marijuana cultivation and use. The state has made no showing that allowing unfettered aerial surveillance will have any effect on the total supply or demand for marijuana. After Oliver, the state has an unlimited right to engage in general systematic aerial surveillance of 95% of the land mass of the United States.

Even assuming a few marijuana plants may escape detection in the

curtilages of homes (rather than escape detection in enclosed greenhouses, or closets, or foreign countries), the issue is whether Americans are willing to pay this minimal price to ensure the state will not have the unfettered discretion to watch a pool party, a wedding, a show of affection or a playful romp with one's children occurring in one's backyard or bedroom with the sunshine streaming in through the window.

CONCLUSION

The Civil Liberties Monitoring Project respectfully requests this Court to decide this intentional aerial intrusion into the sanctity of Ciraolo's curtilage is a Fourth Amendment search requiring probable cause and a search warrant. At a minimum, Amicus believes a

standard of founded suspicion for this kind of search is imperative.

Dated: September 29, 1985

Respectfully submitted,

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THE PEOPLE OF THE STATE OF CALIFORNIA,

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Respondent.

State of California
City and County of San Francisco | as

Amitai Schwartz, a member of the Bar of the Supreme Court of the United States, being duly sworn, deposes and states:

That his business address is 155 Montgomery Street, Suite 800 in the City and County of San Francisco, State of California; that on October 4,1985 true copies of the attached Brief for Amicus Curiae in the above-entitled matter were served on counsel of record by placing same in envelopes addressed as follows:

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Said envelopes were then sealed and deposited in the United States mail at San Francisco, California with first class postage thereon fully prepaid.

Subscribed and sworn to before me this 4th day of October, 1985
